Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
California Payphone Association	)	
Petition for Preemption of	)	CCB Pol 96-26
Ordinance No. 576 NS of the	)	
City of Huntington Park, California	)	
Pursuant to Section 253(d) of the	)	
Communications Act of 1934	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1997 Released: July 17, 1997

By the Commission: Commissioner Ness issuing a separate statement; Commissioner Chong dissenting and issuing a separate statement.

I. INTRODUCTION

1. On December 23, 1996, the California Payphone Association (CPA) filed the above-captioned petition asking the Commission to preempt Ordinance No. 576 NS (Ordinance) of the City of Huntington Park, California (City).[1] The Ordinance prohibits payphones on private property in the City's central business district unless located completely within an enclosed leasable building and more than ten feet from any pedestrian opening into a building. CPA's Petition asserts that the Ordinance violates sections 253 and 276 of the Communications Act of 1934, as amended.[2]

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[1] CPA is a California nonprofit mutual benefit corporation established to promote the general welfare and common business interests of persons and companies engaged in the payphone industry in California. Petition of California Payphone Association for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, Pursuant to Section 253(d) of the Communications Act of 1934 (Petition) at 2.

[2] 47 U.S.C. §§ 253, 276. Sections 253 and 276 were added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

2. The Commission placed CPA's Petition on public notice on December 30, 1996.[3] The City, the American Public Communications Council (APCC), the New England Public Communications Council, Inc. (NEPCC), the New Jersey Payphone Association (NJPA), and XyCom filed comments, and CPA, APCC, XyCom, and Peoples Telephone Company, Inc. (PTC) filed replies.

3. On April 4, 1997, CPA filed a three-page Notice of Ex Parte Communication (Ex Parte) with additional relevant information not contained in its Petition. Consequently, the Commission placed CPA's Ex Parte on public notice on April 15, 1997.[4] The City, NEPCC, and PTC filed supplemental comments.

4 As discussed below, we find the record insufficient to warrant preemption pursuant to section 253 or section 276. Accordingly, we deny CPA's Petition.

II. BACKGROUND

A. The City's Regulation of Payphones

5. The City has taken three steps to regulate payphones since the fall of 1994. First, in October 1994, the City entered into a "Space Use Agreement for Public Telephones" (Payphone Agreement) with Pacific Bell.[5] Under the Payphone Agreement, which continues until at least October 31, 1999,[6] Pacific Bell was permitted to retain the payphones already lawfully installed on the City's public rights-of-way, and may install additional payphones on the public rights-of-way subject to the City's approval.[7] With respect to any new payphone installed under the Payphone Agreement, Pacific Bell must, at the City's request, implement

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[3] *Pleading Cycle Established for Comments on California Payphone Association's Petition for Preemption of Huntington Park, Ordinance Pursuant to Section 253 of the Communications Act*, Public Notice, File No. CCB Pol 96-26, DA 96-2197 (rel. Dec. 30, 1996).

[4] *Pleading Cycle Established for Comments on California Payphone Association's Ex Parte Presentation for Preemption of Huntington Park, Ordinance Pursuant to Section 253 of the Communications Act*, Public Notice, File No. CCB Pol 96-26, DA 97-808 (rel. Apr. 15, 1997).

[5] The Payphone Agreement and its addenda are attached to CPA's Petition at Exhibit 4.

[6] The Payphone Agreement is in effect for an initial term of five years, beginning on November 1, 1994, and is extendable upon the mutual written agreement of the parties. Payphone Agreement at ¶ 1.

[7] Payphone Agreement at ¶ 2.

certain "telephone usage control measures."[8] Moreover, Pacific Bell must pay the City thirty-two percent of the monthly revenue generated by any Pacific Bell payphone located on the City's public rights-of-way that generates more than $150.00 in a given month .[9] The Payphone Agreement also authorizes the City to allow other providers to install payphones on the public rights-of-way, but the City must permit Pacific Bell to maintain on the public rights-of-way at least eighty percent of the number of Pacific Bell payphones that were installed on those public rights-of-way as of November 1, 1994.[10]

6. The City's second step to regulate payphones began in December 1994. Pursuant to its nuisance abatement powers, the City ordered the removal from the sidewalks of approximately seventy-four payphones that lacked permits for the use of public rights-of-way.[11]

7. The City's third step was enactment of the Ordinance on June 17, 1996. The Ordinance governs the placement of payphones on private property in the City's central business district. Its "principal intent and purpose"[12] is stated to be:

> to ensure quality publicly accessible telephone service and installation on private property as an accessory use establishing development and permit standards for publicly accessible telephones that minimize potential public nuisances such as

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[8] Those measures are "a) blocking of incoming calls; b) replacing telephone number with an identification number; c) blocking of pagers; d) installing rotary or pulse only dialing capability; e) blocking all but cash or collect calling; f) blocking all calls for certain time periods; g) blocking calls to certain destinations; h) installing signs on telephone or enclosure indicating the control measures installed; and/or i) other measures which, in the opinion of City[,] will aid in reducing the potential for the telephones installed hereunder to be used in a manner that contributes to illegal or nuisance activities." *Id.* at ¶ 12, Addendum ¶ 5. *See also id.* at ¶ 12, Addendum ¶ 7 (requiring Pacific Bell to maintain payphones and their enclosures in a "damage free condition" and promptly "repair or replace as needed any equipment that becomes damaged, defaced or defective").

[9] *Id.* at ¶¶ 1, 3, Attachment A.

[10] *Id.* at ¶ 4.

[11] *See* CPA Petition at 3-5; Memorandum dated November 15, 1993 from Jack L. Wong, Director of Community Development, to Honorable Mayor Loya and Members of the City Council (attached to CPA's Petition at Exhibit 1); Memorandum dated September 19, 1994 from Jack L. Wong, Director of Community Development, to Honorable Mayor Loya and Members of the City Council (attached to CPA's Petition at Exhibit 3); Letter dated December 5, 1994 from Adolpho Hernandez, Code Enforcement Officer, to The Phone People, Inc. (attached to CPA's Petition at Exhibit 6); Letter dated February 23, 1995 from Marilyn A. Boyette, City Clerk, to William Flaherty, The Phone People, Inc. (attached to CPA's Petition at Exhibit 6).

[12] Ordinance at Section 2 (attached to CPA's Petition at Exhibit 11).

> loitering and solicitation and other indirect criminal activity including the sale of illegal substances and/or documents and telephone calling card fraud.[13]

The Ordinance provides, in pertinent part:

> Section 9-3.3802. Publicly accessible telephones prohibited in downtown area.
>
> No publicly accessible telephones shall be permitted in the area bounded by the centerlines of Slauson Avenue, Malabar Street, Seville Avenue, and Florence Avenue [the "Central Business District"], unless located completely within an enclosed leasable building space and more than ten (10) feet from any pedestrian opening into a building.[14]

8. On its face, the Ordinance seems to prohibit *all* outdoor payphones in the Central Business District, on private property *and* on the public rights-of-way. The record gives every indication, however, that the City continues to permit Pacific Bell to maintain payphones on the public rights-of-way in the Central Business District pursuant to the Payphone Agreement. Moreover, CPA and the City presume that the Ordinance does not preclude Pacific Bell or any other payphone service provider from installing payphones outdoors on the public rights-of-way in the Central Business District pursuant to a contract

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[13] *Id.* The Ordinance also incorporates by reference and adopts all of the findings and conclusions contained within Planning Commission Resolution No. 1591. *Id.* at Section 3. One of those findings is that, in the City's central business district:

> the existence of an excessive number of publicly accessible telephones on the outside of buildings poses a particular threat to public welfare because of a combination of factors in the area. The area is a high volume pedestrian and retail environment surrounded by nearby multi-family residential and school uses that may be adversely impacted by illegal or undesirable activity associated with such phones including but not limited to credit card fraud, illegal document transactions, illegal substance transactions, and loitering. . . .

Letter dated May 3, 1995 from Jack L. Wong, Director of Community Development, to Chairman Mears and Members of the Planning Commission, at Attachment p.2 (attached to CPA's Petition at Exhibit 8). *See id.* at Attachment p.1; Petition at 6-7.

[14] Ordinance at Section 3.

with the City.[15] Consequently, for purposes of this Order, we assume that the City intends not to construe the Ordinance literally to prohibit installation of payphones outdoors on the public rights-of-way in the Central Business District pursuant to a contract with the City.[16]

B. The Telecommunications Act of 1996

9. Through the 1996 Act, Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[17] It also sought "to accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."[18] Among other things, the 1996 Act amended the Communications Act by adding new section 253. Section 253(a) states:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[19]

Section 253(b) states that nothing in section 253:

> shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements

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[15] *See* Petition at 16-18; CPA Reply at 2-3; CPA Ex Parte at 3; City Comments at 2-3; City Supp. Comments at 1-2.

[16] The Ordinance requires the removal of any outdoor payphone on private property in the Central Business District "within six months of notice to comply with the requirements of" the Ordinance. Ordinance at Section 1(a). According to CPA's Petition, the City began to issue notices to comply with the Ordinance on or about September 11, 1996, making removal of offending payphones due on or about March 11, 1997. Petition at Exhibit 12. To facilitate its participation in our consideration of CPA's Petition, however, the City agreed to postpone its enforcement of the Ordinance until at least March 25, 1997. *See California Payphone Association Petition for Preemption of Ordinance 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Order, CCB Pol 96-26, DA 97-70 (Pol. and Plan. Div. rel. Jan. 10, 1997). To our knowledge, the City has continued to refrain from enforcing the Ordinance throughout the pendency of this proceeding.

[17] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (*Conference Report*).

[18] *Id.*

[19] 47 U.S.C. § 253(a).

> necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[20]

Section 253(d) provides:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[21]

10. The 1996 Act also specifically addressed pay telephone services by adding section 276 to the Communications Act.[22] Section 276 is designed "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."[23] The Commission issued regulations implementing the requirements of section 276 on September 20, 1996.[24] Under section 276(c), to the extent that any State requirements are inconsistent with those regulations, "the Commission's regulations on such matters shall preempt such State requirements."[25]

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[20] 47 U.S.C. § 253(b).

[21] 47 U.S.C. § 253(d).

[22] 47 U.S.C. § 276.

[23] 47 U.S.C. § 276(b)(1).

[24] *See Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) (*Pay Telephone Order*), *recon.*, Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) (*Pay Telephone Reconsideration Order*) (collectively, *Pay Phone Orders*), *granting in part and denying in part petitions for review, Illinois Public Telecommunications Association v. FCC*, -- F.3d --, 1997 WL 358160 (D.C. Cir. July 1, 1997) (*Pay Telephone Court Decision*).

[25] 47 U.S.C. § 276(c).

C. The Commission's *Pay Phone Orders*

11. In the *Pay Telephone Order*, the Commission directed each state to examine its regulations applicable to payphones and payphone service providers and remove or modify those regulations that erect barriers to market entry or exit.[26] Certain states filed petitions for reconsideration of that directive, arguing that it unduly infringes upon traditional police powers to combat crime. The California PUC, for example, asserted that:

> the directive in the [*Pay Telephone Order*] to eliminate entry and exit barriers may interfere with the proper exercise of the states' police powers, such as prohibiting them from removing or limiting the placement of payphones. . . . [I]f such actions are construed as a barrier to entry, it would prevent state and local governments from taking action necessary to protect public safety. . . . [L]ocal jurisdictions should be able to exercise police powers, such as zoning restrictions, in order to remove payphones used in illegal activities.[27]

12. In direct response to those concerns, the Commission declared in the *Pay Telephone Reconsideration Order* that nothing in section 276 or the regulations promulgated thereunder precludes the prohibition of payphones in designated areas to combat crime, as long as the prohibition is competitively neutral:

> While we recognize the concerns expressed by the states, we find that none of the actions we have taken to ensure a competitive payphone industry is inconsistent with, or infringes upon, their traditional police powers. . . . [S]tates retain authority to impose certain requirements without competitive effect that are designed to protect the health, safety and welfare of its citizens. For example, reasonable zoning requirements restricting the placement of payphones for public safety purposes are a legitimate exercise of a state's police power, just as a state may designate areas within its jurisdiction where restaurants and other competitive businesses may or may not be located. . . . We emphasize that any state regulations must treat all competitors in

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[26] *See Pay Telephone Order* at ¶¶ 2, 13, 49, 60, Appendix D; 47 C.F.R. § 64.1330(a).

[27] *Pay Telephone Order* at ¶ 134 (footnotes omitted). *See id.* at ¶ 136 ("Maine PUC expresses the concern that this directive would preempt state efforts to prohibit payphones, for example, in areas known for a high level[] of drug trafficking").

> a nondiscriminatory and equal manner, and not involve the state in evaluating the subjective qualifications of competitors to provide payphone services. Thus, a state can identify, for public safety reasons, areas where no competitor can place a payphone; but it cannot draw distinctions that allow some class of competitors to enter the payphone market and not others.[28]

III. POSITIONS OF THE PARTIES

A. CPA

13. CPA challenges the Ordinance only, not the Payphone Agreement or the removal of non-permitted payphones.[29] CPA alleges that the Ordinance is the linchpin of an unlawful scheme by the City to monopolize a payphone services market.[30]

14. According to CPA, for purposes of determining whether the Ordinance falls within the proscription of section 253(a), "[t]he relevant market to consider . . . is limited neither to the City's sidewalks nor to private premises but rather includes the entire central business district -- both public and private property -- on which payphone services may be provided."[31] Moreover, the relevant service to consider is "pay telephone service in the City's central business district."[32]

15. CPA argues that the Ordinance, considered in the context of the City's other recent actions regarding payphones, falls within the proscription of section 253 (a) by "erect[ing] a virtually absolute barrier to entry" in the market for payphone services in the City's Central Business District.[33] According to CPA, in the Ordinance's aftermath, payphone service providers other than Pacific Bell cannot install payphones anywhere in the City's Central Business District: payphones indoors on private property effectively are precluded

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[28] *Pay Telephone Reconsideration Order* at ¶ 140 (footnote omitted).

[29] Petition at 6, 13-14, 17, 17 n.6, 18; CPA Reply at 3.

[30] Petition at 3, 14; CPA Reply at 2, 4, 6; CPA Ex Parte at 1.

[31] CPA Ex Parte at 1.

[32] Petition at 14. *See id.* at 14-15; CPA Reply at 2-3.

[33] Petition at 15. *See id.* at 14-15; CPA Reply at 2-3; CPA Ex Parte at 1.

because they are "uneconomic" and not "commercially viable;"[34] payphones outdoors on the public rights-of-way effectively are precluded because the Payphone Agreement is "exclusive" and the City allegedly refuses to contract with providers other than Pacific Bell;[35] and payphones outdoors on private property legally are precluded because of the terms of the Ordinance itself.[36] Moreover, in CPA's view, the Ordinance still would fall within the proscription of section 253(a), even if the City were to enter into agreements with other providers equivalent to its Payphone Agreement with Pacific Bell:

> No matter how many PSPs [payphone service providers] were involved, the City's own role in the provision of payphone services in its central business district would remain that of a monopolist, extracting monopoly rents from every dollar earned by the participating PSPs, with the addition of a regulatory role for the City that the Commission has found to be impermissible. . . . Viewed in conjunction with the City's claim, under its police power as embodied in Ordinance 576 NS, to prohibit payphones on private property, the City's exercise of discretion to pick and choose among PSPs for sidewalk service amounts to an arbitrary and potentially absolute barrier to entry.[37]

16. CPA also argues that section 253(b) does not save the Ordinance from preemption, because the Ordinance is allegedly neither "competitively neutral" nor "necessary to . . . protect the public safety and welfare."[38] According to CPA, the Ordinance is not competitively neutral because it, combined with the Payphone Agreement, makes Pacific Bell the only viable provider of payphone service in the Central Business District.[39] CPA further argues that the Ordinance is not necessary to protect the public safety and welfare because it,

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[34] *See* Petition at 7 n.4, 14-15; CPA Ex Parte at 2, Exhibit A.

[35] *See* Petition at 5, 14-16; CPA Ex Parte at 3, Exhibit B.

[36] *See* Petition at 13-16; CPA Reply at 2-3.

[37] Petition at 16-17. *See* CPA Reply at 2-3, 5; CPA Ex Parte at 1, 3.

[38] *See* Petition at 13-18 (*citing* 47 U.S.C. § 253(b)); CPA Reply at 4-6; CPA Ex Parte at 2-3.

[39] *See* Petition at 15-16.

like the state commission decision preempted by our *New England Decision*,[40] employs the most restrictive means available -- an absolute ban -- to achieve its objective.[41]

17. Relying on our *Pay Telephone Reconsideration Order*, CPA further maintains that the Ordinance contravenes section 276 and our implementing regulations thereunder, and is thus preempted by section 276(c), for the same reasons that the Ordinance allegedly is preemptable under section 253(d).[42] In CPA's view, the Ordinance -- together with the Payphone Agreement -- impermissibly involves the City in evaluating the subjective qualifications of competitors to provide payphone services in the Central Business District, and inappropriately draws a distinction that allows one competitor, Pacific Bell, and not others to enter the market for payphone services in the Central Business District.[43]

B. The City

18. The City argues that we should not preempt the Ordinance, because it is neither anti-competitive nor discriminatory.[44] According to the City, the Ordinance imposes exactly the same requirements on all payphone service providers and does not favor some such providers in comparison to others.[45] The City points out that the Ordinance does not prevent any entity from installing a payphone inside a building.[46]

19. The City distinguishes our *New England Decision* on the ground that the prohibition struck down in that case affected a particular class of payphone providers and not others, whereas the Ordinance applies to all providers without exception.[47] The City also maintains that our *Pay Telephone Reconsideration Order* actually supports the validity of the Ordinance, because the Commission therein allegedly "acknowledged that local governments

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[40] *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, FCC 96-470, File No. CCB Pol 96-11 (rel. Dec. 10, 1996) (*New England Decision*), *recon. denied*, FCC 97-143 (rel. April 18, 1997) (*New England Recon. Decision*).

[41] *See* Petition at 12-18; CPA Reply at 4-6; CPA Ex Parte at 2-3.

[42] *See* Petition at 12-18.

[43] *See* Petition at 13-18; CPA Reply at 4-5; CPA Ex Parte at 3.

[44] *See* City Comments at 3.

[45] *See id.*

[46] *See id.*

[47] *See id.* at 3-4.

retain the ability to regulate the locations of pay phones pursuant to zoning regulations."[48] In the City's view, the Ordinance is just such a permissible zoning regulation, which the City adopted as part of its effort to combat crime in the Central Business District.[49]

20. The City further argues that CPA improperly "bootstraps" the Ordinance to the City's execution of the Payphone Agreement and removal of non-permitted payphones. According to the City, because CPA concedes the legality of those latter two actions, CPA cannot link those actions with the Ordinance to construct an illegal scheme to extract monopoly rents.[50] Moreover, the City defends the legitimacy of both of those actions, contending that (i) its removal of non-permitted payphones falls well within its traditional powers as the owner of the public rights-of-way,[51] and (ii) the Payphone Agreement resulted from an "entirely competitive" process "in keeping with both the letter and spirit of the applicable FCC policies."[52]

21. The City also maintains that the Payphone Agreement is not exclusive.[53] Rather, the City claims that it will accept "reasonable" proposals from payphone service providers other than Pacific Bell to install payphones on the public rights-of-way in the Central Business District.[54]

C. Other Comments

22. All of the other commenters support CPA's position that we should preempt the Ordinance pursuant to section 253(d), section 276(c), and our *Pay Phone Orders*, for essentially the same reasons stated in CPA's Petition.[55] They argue primarily that the Ordinance, coupled with the Payphone Agreement, amounts to a virtually absolute barrier to

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[48] *Id.* at 4.

[49] *See id.* at 4-5; City Supp. Comments at 1 ("The subject ordinance is the critical element in the City's program to eradicate the crime associated with pay phones in the City's Central Business District").

[50] *See* City Comments at 1-2.

[51] *See id.* at 3.

[52] *Id.* at 2.

[53] *See id.* at 2-3; City Supp. Comments at 2.

[54] *See* City Comments at 2-3; City Supp. Comments at 1-2.

[55] *See* XyCom Comments at 1-2; NEPCC Comments at 2-3; NJPA Comments at 3-7; APCC Comments at 3-9; APCC Reply at 2-4; PTC Reply at 2.

entry,[56] particularly because indoor payphones are inherently uneconomic and unable to compete with outdoor payphones.[57]

23. In addition, several commenters argue that the Ordinance is not competitively neutral, because its effect is to allow only one provider -- Pacific Bell -- to provide payphones at lucrative outdoor locations.[58] XyCom claims that the City did not employ a competitive process to select Pacific Bell and that the City has no permitting process.[59] NJPA, NEPCC, and XyCom contend that the Ordinance must not be necessary to protect the public safety and welfare, because the City still allows Pacific Bell to provide outdoor payphones in the Central Business District.[60] NJPA also asserts that the Ordinance resembles pre-1996 Act ordinances of two New Jersey municipalities that did not survive court challenges.[61] Some commenters also maintain that our *New England Decision* and our *Classic Telephone Decision*[62] require preemption of the Ordinance.[63] In addition, PTC claims that the proliferation of local regulations like the Ordinance would dampen the development of competition among payphone providers that Congress designed the 1996 Act to promote, because such regulations would add costs and legal uncertainties to any geographic expansion effort by a payphone

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[56] *See* XyCom Comments at 1-2; NEPCC Comments at 2; NJPA Comments at 5-6; APCC Comments at 5; APCC Reply at 2-4; PTC Reply at 2.

[57] *See* XyCom Comments at 1; APCC Comments at 3, 5-6; APCC Reply at 2-3; PTC Supp. Comments at 2-3.

[58] *See* NJPA Comments at 3-6; APCC Comments at 7-9; XyCom Comments at 2; XyCom Reply at 1-2; APCC Reply at 3-4; NEPCC Supp. Comments at 2.

[59] *See* XyCom Comments at 1-2; XyCom Reply at 1. *See also* Petition at 5 n.2; CPA Reply at 3.

[60] *See* NJPA Comments at 6-7; XyCom Reply at 2; NEPCC Supp. Comments at 2. *See* CPA Reply at 5-6.

[61] *See* NJPA Comments at 6-7.

[62] *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, File No. CCB Pol 96-10, 11 FCC Rcd 13082 (1996) (*Classic Telephone Decision*), *petition for emergency relief, sanctions, and investigation pending* (filed Dec. 6, 1996), *petition for review held in abeyance, City of Bogue, Kansas and City of Hill City, Kansas v. FCC*, No. 96-1432 (D.C. Cir. Jan. 14, 1997) (denying petitioner's motion for writ of prohibition and *sua sponte* holding petition in abeyance).

[63] *See* NEPCC Comments at 2-3; APCC Comments at 4; PTC Reply at 3; NEPCC Supp. Comments at 2.

provider.[64] XyCom, APCC, and NEPCC state that the Ordinance impermissibly gives the City a locational monopoly.[65]

24. APCC proffers two reasons why section 253(b) would not shelter the Ordinance from preemption, even if the Ordinance were found to be competitively neutral and necessary for the protection of public safety and welfare. First, according to APCC, section 253(b) is merely an "interpretive guideline," not "an exception to the plain meaning of section 253(a)."[66] Second, in APCC's view, section 253(b) does not apply at all to actions of *local* governments, because that section refers only to *state* authority, whereas section 253(c) refers to *both* state *and* local authority.[67]

IV. DISCUSSION

25. For the reasons explained below, we find that CPA, on this record, has not shown that the Ordinance "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" within the meaning of section 253(a).[68] Because the record does not support a finding that the Ordinance falls within the proscription of section 253(a), we do not reach the question whether section 253(b) applies in these circumstances. For similar reasons, we further find that CPA has not shown that the Ordinance conflicts with the purpose of section 276 and our implementing rules "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."[69] Accordingly, on the basis of the record before us, we deny CPA's Petition. Our holding does not preclude CPA from filing a new petition with additional support for preemption.

A. Section 253 Analysis

26. As discussed above, section 253(a), considered alone, bars state and local governments from imposing legal requirements that "prohibit or have the effect of prohibiting

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[64] *See* PTC Reply at 2-3.

[65] *See* XyCom Comments at 2; APCC Reply at 3-4; XyCom Reply at 1-2; NEPCC Supp. Comments at 2.

[66] APCC Comments at 6-7 (*citing* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113, 126 (1996) (*Joint Explanatory Statement*)).

[67] APCC Comments at 7 n.2.

[68] 47 U.S.C. § 253(a).

[69] 47 U.S.C. § 276(b)(1).

the ability of any entity to provide any interstate or intrastate telecommunications service."[70] We have already ruled that payphone service is a "telecommunications service" within the meaning of sections 3(46)[71] and 253(a).[72] Consequently, "state and local regulations regarding the payphone market are subject to scrutiny under section 253 on the basis of a claim that they 'prohibit or have the effect of prohibiting' the ability of potential competitors to provide payphone services."[73]

27. In analyzing whether the Ordinance falls within the proscription of section 253(a), considered in isolation, we assume, without deciding, that CPA's unchallenged characterizations of the relevant service market and geographic market are correct: payphone service, collectively outdoors and indoors, in the Central Business District.[74] Within the context of those markets, we first consider whether the Ordinance "prohibit[s] . . . the ability of any entity to provide any interstate or intrastate telecommunications service."[75] As discussed below, we conclude that the present record does not support such a finding. We then consider whether the Ordinance has the practical "effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[76] We conclude that the present record also does not support that finding.[77]

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[70] 47 U.S.C. § 253(a).

[71] 47 U.S.C. § 153(46). Section 3(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[72] *New England Decision* at ¶ 17.

[73] *Id.*

[74] Although the City does not challenge CPA's characterization of the relevant geographic market, it does point out that "the subject ordinance covers only a several block long stretch in the City's Central Business District; there is no similar restriction regarding pay phones on the exterior of buildings throughout the rest of the City." City Supp. Comments at 2.

[75] 47 U.S.C. § 253(a).

[76] *Id.*

[77] Neither CPA nor any of its supporting commenters argues that the State of California has not delegated to the City the power to enact laws such as the Ordinance. Therefore, for purposes of this proceeding only, we assume without deciding that the State of California has delegated to the City the power to enact the Ordinance.

28. Prior to the City's enactment of the Ordinance, a payphone service provider could install a payphone in three kinds of locations in the Central Business District: (1) indoors on private property (by contracting with the property owner); (2) outdoors on the public rights-of-way (by contracting with the City); and (3) outdoors on private property (by contracting with the property owner).[78] The Ordinance eliminates the third category of locations for all providers, including Pacific Bell. The Ordinance does not, however, expressly restrict the first two categories of locations for any provider. Any payphone service provider may still seek to install payphones in the Central Business District indoors on private property and/or outdoors on the public rights-of-way. Thus, the Ordinance, by its terms, does not "prohibit" the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of section 253(a).

29. Neither the *New England Decision* nor the *Classic Telephone Decision* supports CPA's petition for preemption on the present record. In both of those cases, we found that certain governmental actions were of the kind proscribed by section 253(a) because those actions expressly precluded an entity or class of entities from providing a particular service in a particular area.[79] In the *Classic Telephone Decision*, franchise denials by two cities flatly prohibited a prospective provider of local exchange service from lawfully providing such service anywhere in those cities.[80] Similarly, in the *New England Decision*, a state regulation permitting only incumbent LECs and certified LECs to provide payphone service plainly prohibited a class of entities -- non-LECs -- from lawfully providing such service anywhere in that state.[81] Thus, both of those cases involved express legal prohibitions of service covering the entire relevant geographic market.

30. This case, by sharp contrast, does not involve an express legal prohibition of service covering all of the relevant geographic market. The Ordinance does not completely bar prospective competitors from lawfully providing payphone service in the Central Business District. Specifically, the Ordinance does not "prohibit" payphone service providers from placing payphones indoors on private property and outdoors on the public rights-of-way in the

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[78] Unlike the three kinds of locations in the Central Business District mentioned in the text, a fourth kind of potential location -- indoors on public property (such as a courthouse) -- is not mentioned by CPA or any commenter. Accordingly, we do not address that kind of location in analyzing the lawfulness of the Ordinance.

[79] We also found that (i) the governmental actions involved in those cases did not fall within the powers reserved to states and localities under section 253(b), and (ii) the governmental entities in the *Classic Telephone Decision* did not establish an adequate premise to invoke section 253(c). *See Classic Telephone Decision*, 11 FCC Rcd at 13097-13104; *New England Decision* at ¶¶ 19-25.

[80] *Classic Telephone Decision*, 11 FCC Rcd at 13091-13097.

[81] *New England Decision* at ¶¶ 17-18; *New England Recon. Decision* at ¶¶ 5-6.

Central Business District. Instead, the Ordinance simply specifies certain places within the Central Business District where payphones may not be installed by any payphone service provider. Consequently, neither the *Classic Telephone Decision* nor the *New England Decision* supports a finding on the present record that the Ordinance "prohibits" the ability of any entity to provide payphone service within the meaning of section 253(a).

31. The more difficult issue is whether, under section 253(a), the Ordinance "has the effect of prohibiting" the ability of any entity to provide payphone service in the Central Business District. In making this determination, we consider whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

32. CPA alleges that the Payphone Agreement, the City's removal of non-permitted payphones from the public rights-of-way, and the economics of indoor payphones foreclose the ability of payphone service providers other than Pacific Bell to provide service in two of the three kinds of locations in the Central Business District: outdoors on the public rights-of-way and indoors on private property. CPA further alleges, therefore, that the practical effect of the Ordinance -- which bars payphones from the only remaining category of location in the Central Business District (*i.e.*, outdoors on private property) -- is to foreclose the ability of payphone service providers other than Pacific Bell to provide any payphone service in the Central Business District. Accordingly, in CPA's view, we must preempt the Ordinance so that payphone service providers other than Pacific Bell can enter the payphone service market in the Central Business District by installing payphones outdoors on private property.

33. CPA's argument hinges on the validity of its premise that payphone service providers other than Pacific Bell cannot compete in the Central Business District outdoors on the public rights-of-way or indoors on private property. We now examine the record for support of that premise.

34. CPA and other commenters claim that payphone service providers other than Pacific Bell cannot install payphones outdoors on the public rights-of-way in the Central Business District because the Payphone Agreement is exclusive.[82] The plain terms of the Payphone Agreement, however, allow the City to contract with providers other than Pacific Bell to install payphones outdoors on the public-rights-of-way in the Central Business

[82] *See* Petition at 5, 14-18; APCC Comments at 5-6; NJPA Comments at 5-6; CPA Reply at 2-6; APCC Reply at 2-4.

District.[83] The Payphone Agreement clearly states that "[t]he City shall *not* be required to maintain or install *only* Pacific's public telephones on The City's public way."[84]

35. CPA alleges that, notwithstanding those unambiguous contract terms, the City has implemented the Payphone Agreement in an exclusive manner, making "illusory" the prospect of contracting with the City to install payphones outdoors on the public rights-of-way in the Central Business District.[85] Neither CPA nor any supporting commenter, however, has buttressed that allegation with evidence that, since 1994, the City has rejected any concrete contract proposal from a payphone service provider to install payphones outdoors on the public rights-of-way in the Central Business District.[86] Moreover, no party has proffered evidence that the City has insisted upon contract terms that would effectively prohibit payphone service providers other than Pacific Bell from providing service outdoors on the public rights-of-way in the Central Business District.[87] The only supporting evidence that

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[83] *See* Payphone Agreement at ¶ 4. In fact, it appears on this record that the City deliberately rejected the suggestion of its Director of Community Development to issue an exclusive contract to a single telephone provider. *See* Petition, Exhibits 1, 3.

[84] Payphone Agreement at ¶ 4 (emphasis added). Indeed, despite its unsupported claim that the Payphone Agreement is "exclusive," CPA acknowledges elsewhere in its Petition that the City might contract with payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District. *See* Petition at 16-18.

[85] CPA Ex Parte at 3.

[86] We note that the record contains conflicting evidence concerning the extent to which entities other than Pacific Bell had notice of, or the opportunity to participate in, the process that culminated with the Payphone Agreement. *Compare* City Comments at 2 ("The process by which City made the decision to contract with Pacific Bell was entirely competitive, and in keeping with both the letter and spirit of the applicable FCC policies. City simply made a business decision to contract with Pacific Bell, and said 'No' to alternative proposals made by Petitioner and/or some of Petitioner's member businesses"); Petition, Exhibit 3 (indicating that the City considered at least one proposal -- from MCI -- other than Pacific Bell's), *with* XyCom Reply at 1 (in reaching the Payphone Agreement with Pacific Bell, "[t]he City did not go through the process of an RFP nor did it solicit bids of private PSP's before making a contract decision for the City"). In any event, we note CPA's statement that "this aspect of the City's conduct was not the basis for CPA's Petition. . . . Petitioner has not challenged the City's contract with Pacific Bell." CPA Reply at 3.

[87] CPA makes one reference to the City potentially extracting "monopoly rents" from all payphone service providers, *see* Petition at 17, but CPA makes no argument that: (1) the thirty-two percent revenue sharing arrangement between the City and Pacific Bell amounts to a monopoly rent; (2) the City has insisted or will insist upon the same revenue sharing arrangement with any other provider seeking to install payphones outdoors on the public rights-of-way in the Central Business District; or (3) such insistence effectively has barred or would bar a payphone service provider from installing payphones outdoors on the public rights-of-way in the Central Business District. Accordingly, we express no opinion regarding the propriety of the thirty-two percent revenue sharing arrangement. We note with some concern, however, that Pacific Bell's commission payments to

CPA has offered consists of a single, late-filed declaration of one payphone service provider. According to this declaration, a City official told the provider that the "company is welcome to submit a proposal to install sidewalk phones but that the City sees no need to add more sidewalk phones at present or in the foreseeable future."[88]

36. The City disputes CPA's characterization of the City's implementation of the Payphone Agreement. The City represents that "[e]ntities other than Pacific Bell have both a legal and practical opportunity to contract with the City for pay phones in the public right-of-way in the Central Business District."[89] According to the City:

> as the Pacific Bell contract is intended to be a "pilot program" and does not operate to prevent City from contracting with other PSPs, there is no reason to conclude that the result of the Pacific Bell contract will be the creation of a monopoly.[90]

> The City is not insistent on contracting only with one PSP for phones in the right-of-way. . . . The City's contract with Pacific Bell is not exclusive. . . . [T]he City is willing to agree to any type of reasonable program to insure that PSPs other than Pacific Bell will receive permits for payphones in the public right-of-way in the Central Business District.[91]

37. On the foregoing record, we cannot conclude that payphone service providers other than Pacific Bell lack a realistic opportunity to contract with the City to install payphones outdoors on the public rights-of-way in the Central Business District. The Payphone Agreement expressly permits such contracts; the City officially avows its willingness to enter into such contracts; the City apparently has never rejected such a proposed contract or required prohibitive terms; and the only supporting information adduced -- after five rounds of written submissions -- is one declaration purporting to describe unofficial conversations with one City employee.

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the City apparently are twice as high under the Payphone Agreement than they were previously. *See* Petition, Exhibit 3 at 1.

[88] CPA Ex Parte, Exhibit B at 2.

[89] City Supp. Comments at 2.

[90] City Comments at 2-3.

[91] City Supp. Comments at 1-2.

38. CPA further argues that the City's very involvement in the contracting process for installing payphones outdoors on the public rights-of-way "amounts to an arbitrary and potentially absolute barrier to entry" proscribed by section 253(a).[92] We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results. If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably "prohibits or has the effect of prohibiting" the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.

39. Regarding the viability of payphones indoors on private property, CPA and certain commenters allege that "installation of competing payphones indoors and away from doorways would be impractical and uneconomic, given the types of businesses located in the central business district and the configuration of their premises."[93] They further contend that indoor payphones generate far less revenue than outdoor payphones, because the latter, unlike the former, "are exposed to pedestrian foot traffic and are highly visible to the public."[94] They conclude, therefore, that installing payphones indoors on private property in the Central Business District would not be commercially viable.

40. Even assuming, *arguendo*, that indoor payphones would generate less revenue than outdoor payphones in the Central Business District, that fact, standing alone, does not necessarily mean that indoor payphones are "impractical and uneconomic," as argued by CPA. For us to reach such a conclusion, the record would have to demonstrate that indoor payphones in the Central Business District would generate so little revenue as to effectively prohibit the ability of an entity to provide payphone service in the Central Business District. The present record does not contain much relevant information, however, beyond unsupported assertions of the inferiority of indoor payphones vis-a-vis outdoor payphones. The record says

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[92] Petition at 17. *See id.* at 16-18; CPA Reply at 2-3, 5; CPA Ex Parte at 1, 3.

[93] Petition at 7 n.4. *See* CPA Ex Parte at 2, Exhibit A; APCC Comments at 5-6; APCC Reply at 2-3; PTC Supp. Comments at 3.

[94] APCC Comments at 5. *See id.* at 5-6; APCC Reply at 2-3; Petition at 7 n.4; CPA Ex Parte at 2, Exhibit A; PTC Supp. Comments at 3.

little, for example, regarding the potential opportunities for user traffic for indoor payphones, such as information concerning the number, type, configuration, and hours of operation of businesses located in the City's Central Business District; the potential impact of advertising outdoors the availability of a payphone indoors; and the feasibility of competing with outdoor payphones by offering lower coin rates indoors. The record also says little regarding the actual revenue potentials and break-even levels for indoor payphones in the Central Business District. Indeed, in this regard, the record includes only a year-old letter from a payphone service provider to the City, which letter contains unsubstantiated observations about the viability of indoor payphones.[95]

41. On the present record, therefore, we cannot conclude that payphone service providers lack a commercially viable opportunity to install payphones indoors on private property in the Central Business District. We do not rule out the possibility that such a showing could be made. We simply find, on this record, that CPA has not sufficiently supported its allegation that operation of indoor payphones on private property in the Central Business District would be "impractical and uneconomic."

42. In sum, for the reasons discussed above, we conclude that the present record does not support the premise on which CPA's request for preemption under section 253 rests -- that the Ordinance bars payphone service providers other than Pacific Bell from the only locations in the Central Business District that would otherwise be available and viable for the installation of their payphones. In other words, we do not find that the Ordinance's requirement that payphones on private property in the Central Business District be indoors materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. We further conclude, therefore, that the record does not support a finding that the Ordinance "prohibit[s]" or "ha[s] the effect of prohibiting" the ability of any payphone service provider to provide payphone service in the Central Business District. Accordingly, on the record presently before us, we find that the Ordinance is not proscribed by section 253(a) and that, therefore, no predicate for preemption pursuant to section 253(d) exists.[96]

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[95] *See* CPA Ex Parte at Exhibit B.

[96] Of course, were the Ordinance ever shown to fall within the proscription of section 253(a), we would then need to examine the applicability of section 253(b), given that CPA seeks federal preemption of a local law that the City maintains was enacted to fulfill an essential municipal duty -- preventing criminal activity in the Central Business District. *See* Ordinance at Sections 2, 3; City Comments at 4-5. Specifically, we would need to examine whether the Ordinance is "competitively neutral" and "necessary" to protect the public safety and welfare. *See* 47 U.S.C. § 253(b).

B. Section 276 Analysis

43. Pursuant to the Supremacy Clause of Article VI of the Constitution, we may preempt local laws that impede the accomplishment of the objective of section 276 "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."[97] Moreover, Congress has expressly preempted any state requirement that is inconsistent with regulations promulgated by the Commission to implement section 276.[98] Those regulations direct, *inter alia*, the removal of all state rules that impose market entry requirements or that allow a particular class of competitors to enter the payphone market and not others.[99]

44. In the *Pay Telephone Reconsideration Order*, the Commission has already concluded that, without running afoul of section 276 and regulations implementing that section, "a state can identify, for public safety reasons, areas where no competitor can place a payphone," as long as the state does not "draw distinctions that allow some class of competitors to enter the payphone market and not others."[100] Thus, in examining the Ordinance to determine whether preemption is appropriate in this context, we must determine whether the Ordinance draws any legal or practical distinctions that allow some class of competitors and not others to enter the payphone market in the City's Central Business District.[101]

45. On the record before us, we cannot conclude that the Ordinance draws such impermissible distinctions among competitors. The Ordinance identifies, purportedly for public safety reasons, areas where no competitor can place a payphone: outdoors on private property in the City's Central Business District. As a result, the Ordinance, on its face, bars all competitors -- including Pacific Bell -- from installing payphones at such locations. Moreover, the Ordinance, as apparently construed by the City, precludes no competitor from installing payphones in the Central Business District indoors on private property or outdoors

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[97] 47 U.S.C. § 276(b)(1). *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986).

[98] 47 U.S.C. § 276(c).

[99] *See Pay Telephone Order* at ¶¶ 2, 13, 49, 60, Appendix D; *Pay Telephone Reconsideration Order* at ¶¶ 134, 139-40; 47 C.F.R. § 64.1330(a).

[100] *Pay Telephone Reconsideration Order* at ¶ 140. The petitions for review adjudicated by the *Pay Telephone Court Decision* did not challenge this aspect of the *Pay Telephone Reconsideration Order*.

[101] CPA does not challenge the Payphone Agreement or the City's removal of payphones without permits from the public rights-of-way in the Central Business District, so our analysis under section 276 applies only to the Ordinance.

on the public rights-of-way pursuant to a contract with the City. Furthermore, as explained more fully above, there is no basis on this record to conclude that payphone service providers other than Pacific Bell lack a realistic and viable opportunity to install payphones outdoors on the public rights-of-way or indoors on private property in the Central Business District. Thus, the present record does not support a finding that the Ordinance -- by its terms or its effect, alone or in conjunction with the Payphone Agreement -- draws any impermissible legal or practical distinctions that allow only Pacific Bell and not others to enter the market for payphone services in the City's Central Business District. Accordingly, on the record before us, we find no basis to preempt the Ordinance pursuant to the Supremacy Clause or section 276(c).[102]

V. ORDERING CLAUSE

46. Accordingly, IT IS ORDERED that the Petition for Preemption filed by the California Payphone Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[102] We note that CPA does not allege that the Ordinance has led or will lead to callers being charged supra-competitive local coin rates. Such an allegation, if made and proven, might warrant regulatory action by the State of California and/or the Commission. *See generally Pay Telephone Order* at ¶¶ 15, 61 (In certain locations, "the location provider can contract exclusively with one PSP to establish that PSP as the monopoly provider of payphone service. Absent any regulation, this could allow the PSP to charge supra-competitive prices. . . To the extent that market forces cannot ensure competitive prices at such locations, continued regulation may be necessary"); *Pay Telephone Court Decision* (denying challenges to the *Pay Phone Orders*' rulings regarding locational monopolies).

July 16, 1997

Separate Statement
of
Commissioner Susan Ness

Re: City of Huntington Park

Our decision today correctly declines to preempt Huntington Park Ordinance No. 576 NS on the basis of the record before the Commission. Our decision should communicate at least three messages:

First, Congress carefully crafted the preemption language in Section 253 of the Telecommunications Act of 1996. Congress entrusted the Commission to navigate between two critical but competing objectives: (1) fostering competition, by enabling "any entity to provide any interstate or intrastate telecommunications service." (Sec. 253(a)); and (2) allowing the legitimate exercise of state and local authority (Sec. 253(b) and (c)).

In this case, the City of Huntington Park has premised its actions on the police powers of the City. We assume that the state has delegated to the City the power to enact the Ordinance. The record provides some basis for the City's assertion that its pay phone regulations are directed at crime abatement. We stress, however, that the mere incantation of concerns with public safety or crime control, without more, does not immunize a local action against preemptive action. The statute directs the Commission to evaluate the effect of local or state actions on competition -- a task which requires a thorough review of the facts in each case.

We are proceeding with great care -- and with respect for the competing considerations spelled out in Sec. 253. The Commission's decision today is evidence of the restrained judgment Congress intended the Commission to exercise in preemption cases.

Second, our decision today should not be read by state and local authorities as an endorsement of the actions taken by Huntington Park, nor should it be viewed as an affirmative finding that the City's actions are consistent with the Act. Rather, we conclude that, on this record, the petitioner has not demonstrated a violation of Section 253 or of our pay telephone orders. For example, if a government action "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any telecommunications service" (253(a)), that action must be

preempted unless it is shown to be "competitively neutral" and "necessary" to protect the public safety and welfare (253(b)).

In the instant case, we were not able to rule that the City violated 253(a); thus, we did not take the next step to draw conclusions on "necessity" or "competitive neutrality." It is far from clear whether, in practice, the Huntington Park Ordinance and Payphone Agreement are necessary to prevent crime, and if so, whether they do so in a competitively neutral manner. In particular, I am troubled by the distinction the City has drawn in its central business district between private property (where no outdoor payphones are permitted) and public property (where only Pacific Bell's outdoor payphones currently exist). It is unclear why an outright ban on outdoor payphones on private property is necessary when the City permits payphones to be located on outdoor public property, even immediately adjacent. Why can't the City achieve its anticrime objectives by imposing the same operational limitations (no incoming calls, etc.) on payphones in both locations?

We are not eager to second-guess the decisions made by officials of other government agencies. By the same token, municipal and state authorities can reduce the potential for inter-jurisdictional conflict by crafting their laws, regulations, and decisions consistent with the Act's goal of robust competition in all telecommunications services.

Third, our decision in no way precludes parties from petitioning again to preempt the Ordinance. Any future filings should contain more explicit information on the effect of the Ordinance and the Payphone Agreement on payphone competition. For example, more information on the ability of other providers to enter into similar arrangements with the City would have been probative here.

Under the Payphone Agreement, the City is obligated to permit Pacific Bell to retain 80 percent of the Pacific Bell payphones installed on public outdoor property as of November 1, 1994. Although we were not asked to preempt the Payphone Agreement, I am troubled by this arrangement. Unless other payphone providers are able to negotiate similar agreements, Pacific Bell's payphones will be the only payphones located outdoors. But Huntington Park has asserted that its arrangement with Pacific Bell is not exclusive, and there is little contrary evidence, so we are unable to conclude -- at this time and on this record -- that other payphone providers are foreclosed from negotiating similar arrangements.

Congress has promised new entrants an opportunity to compete, but not freedom from every possible hindrance that may result from state or local regulation. Those who seek preemptive action by this Commission should be prepared to demonstrate, with particularity, precisely how the municipal or state action forecloses them or others from competing and what remedy will most effectively solve the problem. The stronger the evidentiary record, the greater the likelihood that we will be able to take corrective action.

July 16, 1997

DISSENTING STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934.

I respectfully dissent from the Commission's decision today to deny petitioners' request to preempt the City of Huntington Park's Ordinance banning outdoor payphones on private property within its central business district.

At the outset, I do not question a state's or local government's legitimate right to exercise its police power to establish reasonable zoning requirements restricting the placement of payphones for public safety purposes. I believe, however, that the record before us demonstrates that the City's Ordinance, considered in conjunction with the City's overall program regulating payphones, has the effect of banning competitive offerings of outdoor public payphone service in Huntington Park's downtown district. In my view, the Ordinance violates Section 253(a) and (b),[1] as well as the twin statutory goals set forth in Section 276 of promoting competition among payphone service providers and the widespread deployment of payphone services.[2]

I agree with my colleagues that, on its face, the Ordinance is competitively neutral in that it effectively bans, in the downtown area, the provision of *all* payphone service on outdoor *private property* and within ten feet of any entrance to a building. As the majority acknowledges, however, the more difficult question is whether the Ordinance "has the effect of prohibiting" the ability of any entity to provide payphone service on both *public and private property* in the downtown area. Today's decision finds the record inadequate as to evidence demonstrating that competitors are essentially barred from entering the downtown outdoor payphone market in the City of Huntington Park. I disagree with my colleagues on this point.

In denying the petitioner's claims that the Ordinance in effect cordons off the City's downtown outdoor payphone market to new entrants, the majority focuses on the

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[1] 47 U.S.C. Section 253(a), (b).

[2] 47 U.S.C. Section 276 (b)(1).

following: (i) competitive entry for outdoor payphones on public property is permitted under the terms of an existing contract between the City and its sole provider of outdoor payphones; and (ii) the record fails to indicate any affirmative attempt or action by a competitor to contract with the City to provide payphones on public property outdoors.[3]

In my view, the majority's analysis is too narrowly focused. I believe that our inquiry into the practical competitive effects of the Ordinance should not end because of the mere existence of contractual language which on its face *appears* to permit competitive entry. One cannot measure the competitive effect of an Ordinance on a dynamic marketplace looking only at the static language of a single contract between the City and a payphone provider. It would be preferable for the Commission to consider whether, under actual marketplace conditions, the City's Ordinance effectively is prohibiting payphone competition. In doing so, we should assess the Ordinance in the full context of both the City's overall actions and omissions in attempting to implement a payphone regulatory program, and the marketplace conditions that entrepreneurs currently face when seeking to provide competitive payphone services in downtown Huntington Park.

If we did this assessment, we would find that the City's program in fact is impairing payphone competition. Today's decision states that, before adoption of the Ordinance, payphone service providers could place a payphone in Huntington Park: "(1) indoors on private property (by contracting with the property owner); (2) outdoors on the public rights-of-way (by contracting with the City); and (3) outdoors on private property (by contracting with the property owner)."[4] The majority finds that the Ordinance does not violate section 253(a) because it eliminates the third category of locations for all providers, but does not, on its face, restrict the first two for any provider. I believe, however, that the record in this case raises questions about the majority's fundamental assumption that three separate relevant payphone markets exist within the City's downtown area. As the petitioners note, the relevant market for measuring the effects of the City's Ordinance on competitive entry should not be limited to the City's sidewalks nor to private premises, but rather should include the *entire* downtown business district – both public and private property – on which payphone services may be provided.

If viewed from the perspective of the relevant market being the entire downtown business district, our analysis would likely lead to a contrary result than that reached today. The record reflects that the City, under its police power authority, initiated the first step of its payphone regulatory program in October 1994, by signing a five year contract with one telecommunications provider to install and retain public telephones in the City's *outdoor public* rights of way. In December 1994, the City, under its authority to abate public

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[3] See paras. 34-35.

[4] See para. 28.

nuisances, embarked on the second step of its program by ordering the removal of 70 to 80 *outdoor* non-permitted sidewalk pay telephones on *public property* belonging to private payphone service providers. Finally, in June 1996, the City enacted the Ordinance requiring the removal of all pay telephones located in the City's downtown business district on *private property* either *outdoors* or within ten feet of any outside doorway.

The record thus demonstrates that before adoption of the Ordinance, the City contracted with only one payphone service provider for all of the outdoor payphones on *public property*. The City then used its power to abate public nuisances to eliminate all competing public telephones on *public property outdoors*. Next, the City adopted its Ordinance requiring the removal of all pay telephones located on *private property* within the downtown business district. In my view, the Ordinance – by effectively banning competing payphones on private property – along with the other two regulatory measures taken by the City, impermissibly allows the City to exercise monopoly power over the payphone services market in the downtown business district.

The majority disagrees, and contends that, as a legal matter, potential competition for the provision of outdoor payphones on public sidewalks is unobstructed because contractual language exists which allows the City to contract with providers other than the incumbent provider. Today's decision also points out that petitioners failed to produce any factual evidence demonstrating that the City had ever rebuffed a "concrete contract proposal" from a competing payphone service provider to install outdoor payphones on public property.

Looking beyond the four corners of the contract, I believe the record contains ample evidence of the City's intent to contract with only one provider. For example, several staff memoranda regarding payphones forwarded to the Mayor and City Council of Huntington Park, before the City payphone contract was signed, contained recommendations advocating that the City should contract with only one payphone service provider.[5] Unrefuted evidence in the record indicates that, in seeking the provision of payphone service for its "pilot program," the City neither engaged in a "Request for Proposal Process" nor sought to solicit any bids from private payphone providers before signing the payphone contract.[6]

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[5] Memorandum, dated November 13, 1993, from Jack L. Wong, Director of Community Development, to Mayor Loya and Members of the City Council (attached to CPA's Petition at Exhibit 1); Memorandum, dated September 19, 1994, from Jack L. Wong, Director of Community Development, to Mayor Loya and Members of the City Council (attached to CPA's Petition at Exhibit 3).

[6] XyCom Reply Comments at 1.

The record also provides some insight as to why petitioners did not submit a "concrete contract proposal" from the City. According to a signed and unrefuted declaration from a corporate officer of a private payphone provider, a City official had informally told the payphone company that it was free to submit a proposal to the City, "but that the City sees no need to add more sidewalk phones at present or in the foreseeable future."[7] The record further indicates that the incumbent payphone provider nearly doubled its commission payments to the City after signing the contract to provide payphone service on city sidewalks.[8]

In my view, the weight of the evidence supports the petitioners' contention that the City's Ordinance, viewed in conjunction with its payphone regulatory program, is designed to ensure that payphone services provided in the outdoor downtown area of Huntington Park are the exclusive domain of the City's hand-picked provider. It is no coincidence that the chosen provider is one who has doubled its commission payments to the city coffers in exchange for the privilege of a *de facto* monopoly, despite Section 276's mandate that the payphone market be procompetitive in the future. Thus, I would have found that the City's payphone program shortchanges payphone users, because it effectively bans competition for outdoor payphone service in the City's downtown district.

I also cannot join the portion of the majority's decision that finds the record insufficient as to whether the Ordinance frustrates competition because, as petitioners contend, it limits competitive payphone providers to the offering of services only *inside* downtown commercial buildings. In my view, common sense tells us that such an overly narrow restriction will result in competitors not entering the market, because as a practical matter, offering payphones only *well inside* downtown buildings is not likely to be a commercially viable opportunity.[9] A limit to only indoor payphone sites will significantly reduce the number of calls placed, and therefore, the revenue potential of the payphone.

Today's decision, however, rejects this sensible conclusion on the basis that petitioners failed to submit extremely-detailed economic analyses that would include "actual revenue potentials and break-even levels for indoor payphones" demonstrating that these type of payphones are impractical and uneconomic. In my view, petitioners have met their evidentiary burden and the additional data which the Commission seeks is unnecessary, overly burdensome, and runs contrary to our general procompetitive, deregulatory charge

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[7] *Ex Parte* Letter dated April, 4, 1997, from Martin A. Mattes, Attorney for California Payphone Association, to William F. Caton, Acting Secretary, FCC, at Exhibit B.

[8] *See* California Payphone Association Petition, Exhibit 3 at 1.

[9] Again, the relevant market at issue here is the entire downtown area.

under the 1996 Act. In my opinion, the City's requirement limiting the placement of competitive payphones in the downtown area to indoor private property not only has a negative effect on competition, but also frustrates Section 276's mandate to encourage the "widespread deployment of payphone services."

Since today's decision finds no violation of Section 253(a), it does not reach the issue of the applicability of Section 253(b), which permits a State to supersede Section 253(a) if it imposes "on a competitively neutral basis and consistent with Section 254, requirements necessary to . . . protect the public safety and welfare." In the matter at hand, petitioners seek federal preemption of a local Ordinance that the City of Huntington Park contends was enacted to prevent criminal activity in the Central Business District. I address the applicability of Section 253(b), because I think we should have found that the Ordinance violates Section 253(a).

As I stated above, I do not question a state or local government's legitimate right to exercise its police power to set reasonable zoning requirements restricting the placement of payphones for public safety purposes. The City has the power to take reasonable measures to protect its citizens from criminal activity. Yet, it would be preferable if the City exercises that authority in a way that promotes its public safety goals, while doing so in a competitively neutral fashion as to telecommunications competitors. I am quite troubled by the fact that nowhere in the record does the City provide a rationale as to why it chose to ban *all* competing payphones on outdoor private property rather than mandate, in a competitively neutral fashion, that all outdoor payphones should have the same anti-crime features and functions required under its contract for all nearby payphones on public property. Further, I see no evidence on the record from the City that would explain why a payphone on outdoor private property poses a greater threat to public safety and welfare thus necessitating a complete ban, whereas a payphone across the street provided on public property would not pose that same threat. If the City does need to restrict the placement of payphones for public safety purposes, it ought to do so in a way that is fair and does not pose an arbitrary entry barrier to competitive payphone providers.

I agree with the petitioners that Section 253(b) does not permit the City to protect its proprietary interest in the provision of sidewalk payphones by applying different regulations to competitors on private property. Thus, I would have preempted the ordinance.